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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

Donald R. Lewis
Petitioner

Vs.

Department of Agriculture
Respondent

On Petition For A Writ Of Certiorari To United States
Court Of Appeals
For The Federal Circuit

Petition For Writ Of Certiorari

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Pro Se

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Questions Presented

1. Did the Respondent commit harmful procedural error under 5 USC 7701 (c) (2) when it violated its own procedural guidelines for misconduct investigations and reports and caused substantial prejudice to Petitioner's individual rights by affecting the Agency's decisions, violate Petitioner's due process rights, and deprive him of Equal Protection under the law when taking away his employment interest after over 36 years of Federal Service with no disciplinary record, a history of the highest/near perfect performance rating, 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable discharge and Letter of Appreciation from General William Westmoreland for his war time service? Further, did the Appeal Court and Merit Systems Protection Board violate the same stated rights and abuse their discretion when they failed to find harmful procedural error? Petitioner and all employees should be provided the protection of the procedural guidelines. Additionally did they ignore the prohibited personnel practice committed when the Respondent sought to force Petitioner to sign a fraudulent position description, initiated the 40 year plus Investigation that he was subjected to thereafter, and removal?

2. Did the respondent violate Petitioner's Due Process Rights, Fifth Amendment of The U.S. Constitution, Equal Protect Under the Law, and the wrongfully taking away of his protected property interest in his employment under the U.S. Constitution's Fifth

Amendment by refusing and failing to provide requested needed specifics such as descriptive details of alleged conclusory comments about employees weight, and dates, times, and places of the alleged inappropriate comments and then charging him with making false statements during an official investigation when he would not agree with the statement presented under the vague, conclusory, and non-specific charge? On the same issue, did the Respondent violate its own procedural guidelines which states "the report should tell a story of what happened, who was involved, when and where it happened and why it happened? Further, did the Board and Appeal Court violate the same rights of Petitioner and improperly shifted to Petitioner the burden of proving that he did not make false statements during an official Investigation? All American citizens deserve above protections.

3. Did the Appeal Court and Merit Systems Protection Board abuse their discretion, violate Petitioner's due process rights, and deprive him of Equal Protection of the Law by substituting a new charge to replace "directing" after the hearing in order to find for Respondent?

4. Did the Appeal Court and Merit Systems Protection Board abuse their discretion, violate Petitioner's due process rights, and deprive him of Equal Protection of the Law by adding a new charge of "pattern of conduct over time" after the hearing in order to find for Respondent and seek to justify the Respondent's

inability to provide Petitioner with needed detail descriptive specifics and dates, times, and places of alleged incidents and alleged conclusory, vague comments? Failure to provide such violates Respondents own procedural guidelines.

5. Did the Board violate Petitioner's Due Process Rights and right to Equal Protection under the Law when it made the erroneous and biased general demeanor/credibility finding on page 10 of its initial decision and then using the same to harm Petitioner on credibility and findings for the remainder of the decision and in wrongfully taking away his property interest in his employment under the 5th Amendment of the U.S. Constitution? Did the Appeal Court violate the same rights of Petitioner and abuse its discretion in deferring to the Board's erroneous demeanor/credibility findings including such error as failing to describe Petitioner's carriage, behavior, manner, and appearance? Did the Appeal Court and Board abuse their discretion and violate Petitioner's due Process Rights, Equal Protection Under the Law, and the wrongful taking of his employment by failing and refusing to address the issues under Seavello v. Department of Navy, 4 MSPB 239 (1980), and the prohibited personnel practice of seeking to force him to sign a fraudulent position description and reprisal for his failure to do so?

7. Did the Respondent violate Petitioner's rights to Equal Protection Under the Law, due process rights, and Fifth Amendment of the U.S. Constitution by

charging him with unintentional/negligence and then applying the element of intent in reaching the penalty of removal? This would allow an organization to take away employees employment rights without proving the element of intent. Further, did the Appeal Court and Merit Systems Protection Board violate the same stated rights and abused their discretion when they sustained the findings and penalty of removal? Respondent never refuted that they knew Petitioner was being paid the compensatory time for over 10 years in the manner processed by responsible timekeepers?

8. Did the Appeal Court and Merit Systems Protection Board abuse their discretion and deprive Petitioner of Equal Protection of the Law by sustaining a specification of catching J. Nguyen's arm as inappropriate conduct when she swung at Petitioner In a playful act that she did not report until many months later after learning of being impacted by a reduction-in-force and then clearly testifying that it was "petty"?

9. Did the Appeal Court engage in judicial misconduct, abuse its discretion, and deny Petitioner Equal Protection of the law, when considering retirement eligibility when making a decision in Petitioner's case even though the subject was not in issue?

10. Did the Appeal Court and Board abuse their discretion and deny Petitioner. Equal Protection of the Law by stating that matters are in evidence in

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Donald R. Lewis v. Department of Agriculture, Docket Number DA-0752-06-0686-I-1, October 3, 2007, Merit Systems Protection Board, Final Order

Donald R. Lewis v. Department Of Agriculture, Docket Number DA-0751-06-0686-I-1, May 10, 2007, Merit Systems Protection Board, Initial Decision

Donald R. Lewis v. Department of Agriculture, 2008-3031, May 1, 2008, Order of United States Court of Appeals For The Federal Circuit denying Petition For Rehearing

Jurisdiction

The date on which the United States Court of Appeals For the Federal Circuit decided my case was March 7, 2008. Appendix A.

A timely petition for rehearing was denied by the United States Court of Appeals For the Federal Circuit on the following date: May 1, 2008, and a copy of the order denying rehearing appears as Appendix D.

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

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Statement of The Case

The Petitioner entered Federal employment in 1971 as a Labor Management Relations Examiner with the National Labor Relations Board. In February 1989, he transferred to the U.S. Department of Agriculture, National Finance Center (NFC), in New Orleans, Louisiana as a GS-12 Supervisory Labor Relations Specialist, up graded to GS-13. In 1997, former NFC Director John Ortego selected Petitioner to design, develop, and manage what later became known as the Equal Employment Opportunity and Workforce Services Staff (EEOWSS), due to a crisis of employment environment issues. See Appendix F.

In the position as manager, Petitioner almost single-handedly changed the employment environment of the Agency from one that had become nationally known for its poor employment environment to one nationally recognized for its model employment environment. He won national awards and recognition for himself and the Respondent, including such awards as the Office of Personnel Management Director's Award and the USDA's Secretary's Award for operating an efficient, effective, and discrimination-free organization. See Appendix F. Petitioner is the only manager of EEO or EEOWSS programs for the Respondent to have won such awards for himself and the programs. He became known as one of the most innovative and achieving EEO managers in the Federal Government, prior to the charges in

the within matter, Petitioner, in his over 36 year employment history with the Federal Government, had never been the subject of any disciplinary action. His performance was always at the Outstanding or Superior levels, with his last performance rating at the Outstanding level. He served 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable Discharge and Letter of Appreciation from General William Westmoreland for his war time service. The investigation and charges were instigated and orchestrated by one employee using it to get a promotion (Patricia Bachemin), and another employee (J. Nguyen), and her friends, who wanted the ultimate decision making responsibility to determine who would be included in the reduction-in-force (RIF). In February 2005, Bachemin actually went to the deciding official and sought two things: (1) a promotion, and (2) Petitioner's termination. She received both. The Agency refused to present her at the hearing so that she could be examined by Petitioner. Virginia Gaye Cook, Head of Operations and Agency Misconduct Investigation Coordinator, prepared and sent a promotion position description to Petitioner for promotion of Bachemin that was fraudulent. By regulation and practice, Petitioner should have been the preparer of the position description. Cook became upset when Petitioner refused to sign the fraudulent position description. Bachemin was promoted shortly after Petitioner's proposed removal and administrative leave. The refusal of the Board and Appeal Court to address

the position description and the Seavello issues deprived petitioner of due process, equal protection of the law, and of protection against a prohibited personnel practice. Kushindana, a friend of J. Nguyen, told Petitioner that if he followed through with J. Nguyen being impacted by the RIF instead of M. Nguyen, that he could expect to have problems from her and others in the office. On August 3, 2005, Kushindana told Petitioner that since it appeared that he wasn't going to leave, she was going to have to run him off. See Appendix H. Only 16 days later, August 19, 2005, the Investigator who had been operating in collusion with Kashindana, Bachenin, J Nyagen, and others, told Petitioner at the opening of his initial interview, "You ought to be out of here" and that he should be retired. Given the Investigator's conduct and gross procedural violations, it is Petitioner's position that the Investigator was hired to build a case for his removal.

Cook, arranged for Petitioner to be investigated by a contract investigator with whom she has close ties. The Investigator was instructed to investigate Petitioner for a period spanning over 40 years including years before his employment by the Federal Government. The charges were vague and non-specific as to when and what Petitioner allegedly did and denied his due process rights. When Petitioner could not agree with the conclusory comments under the charges on employees' weight, he was charged with making false statements during an official investigation.

The investigator violated every provision of the procedural guidelines for investigation dated March 24, 2003 which states that "Investigators **should** avoid personal opinions, or conclusions, and **should not** make disciplinary recommendations a part of the report." See Appendix E. The Investigator violated these provisions and thereby denied Petitioner due process and equal protection under the law. This caused substantial prejudice to Petitioner's individual rights by affecting the agency's decision.

The Appeal Court and tribunals below failed to find harmful procedural error even though it is clear that the Respondent violated its own procedural guidelines in the investigation of Petitioner and in the use of the Report of Investigation in reaching the penalty decision to remove Petitioner. The Appeal Court and tribunals below violated Petitioner's Due Process Rights, Fifth Amendment of The U.S. Constitution, and Equal Protection Under The Law in their findings on Petitioner being provided conclusory statements rather than requested needed specifics such as descriptive details of alleged conclusory comments, dates, times, and places of alleged inappropriate comments, and the finding of Petitioner's inability to agree with the vague, conclusory, and non-specific charges as making false statements during an official investigation. They changed the charge on "directing" after the hearing and grossly misdescribed employees on the issue and their relationship with Petitioner. The

Appeal Court and tribunals below upheld Respondents charging Petitioner with unintentional/negligence and then applying the element of intent for the same charges by sustaining the Penalty of Removal on the basis of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985) (Appendix J), wherein the Agency charged the Appellant with negligence but **improperly** removed him based on the element of intent. The Board and Appeal Court accepted the Respondent's use of conclusroy, boiler plate language on penalty without a balanced and reasoned discussion of all relevant and mitigating factors. The table of penalties was not honestly considered.

When it became clear to Petitioner that the Respondent and this particular group of employees were determined to destroy him, Petitioner sought and received favorable consideration for employment by two other Federal agencies. One Agency offered Petitioner a position and he accepted. However, one day after the agency contacted the Respondent for transfer of Petitioner, the offer was withdrawn. When the other agency contacted Respondent for reference on Petitioner, the agency stopped their process of consideration. It became clear to Petitioner at this point that the Respondent was interested in destroying Petitioner and not just removing him.

On August 29, 2005, Hurricane Katrina made

landfall in New Orleans, Louisiana, and Petitioner evacuated. On February 22, 2006, Petitioner returned to New Orleans and Respondent facility. On March 28, 2006, 34 days after Petitioner's return, Respondent issued Petitioner a proposed removal letter and placed him on administrative leave. Effective September 16, 2006, Petitioner was removed.

On April 18, 2008, during a return call to the Appeal Court on a request to submit copies of case decisions, an Appeal Court personnel began stating/asking Petitioner repeatedly out of the "blue", "you can retire can't you?" This placed Petitioner on notice that the Appeal Court had considered retirement eligibility when making a decision in his case. Petitioner has never raised an issue of retirement eligibility with any tribunal considering his case. See Appendix O.

The Appeal Court states on page 6 of its decision that Byrne's affidavit stated that she learned of the contract employee's conduct from another employee to whom I, J. Nguyen and Kushindana had complained. This is not in Byrnes affidavit, The Appeal Court states on page 8 of their decision that "Mr. Lewis acknowledged that on at least one occasion he picked up one copy of Ms. Nguyen faxes and delivered it to her." There is no evidence in the record that Petitioner ever made such acknowledgement. On page 49 of the Board decision, the AJ states "The record further reflects that M. Nguyen's non-work-related

activities continued into August 2005." Not true and not in the record. M. Nguyen was not in America from July 26, 2005, thru August 26, 2005. She was on administrative leave from August 26, 2005, thru November 14, 2005, due to Hurricane Katrina, The stating that such matters are in evidence in the record is in error, an abuse of discretion, and harmed Petitioner by taking away his property interest in his employment.

REASONS FOR GRANTING THE PETITION

Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard in paragraph (a) of this section, if the appellant:

1. Shows harmful error in the application of the agency's procedures in arriving at its decision;

2. Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302 (b); or

3. Shows that the decision was not in

accordance with the law.

Harmful error has been defined as error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

The agency's action constituted harmful error as defined at 5 CFR 1201.56(c)(3) when it failed to follow the procedures outlined in its procedure issued to "Agency/Mission Area Employee Misconduct Investigation Coordinators" to ensure Department wide standards of quality and consistency in the preparation of employee misconduct investigation reports. See Appendix E. The guidelines provides:

1. Investigators **should avoid personal opinions or conclusions, and should not make disciplinary recommendations a part of the report.**

2. The report should tell a story of what happened, who was involved, when and where it happened and why it happened.

3. **Investigators should refrain from drawing conclusions on the merits of the allegations.** Investigators are exposed to information during the investigation which may not be incorporated in the investigative file, but nevertheless could bias the investigator relative to any analysis of the allegations and could

improperly influence the decision-maker.

4. If someone gives a statement naming another person as having information relevant to the allegations, get a statement from that person. The procedure guidelines exist for the protection of all employees of USDA and to regulate the conduct of "investigators" assigned to investigate misconduct allegations of any employee of USDA. The procedure guidelines do not provide for any employee to be provided less protection than is in the procedure guidelines. Appendix E. To say that Respondent can provide Petitioner and some of its employees less protection than is provided in its procedural guidelines by assigning a contract investigator rather than an employee investigator deprives employees of equal protection under the law and is not in accordance with the principle of fairness for American Citizens.

The investigator provided personal opinions, conclusions, and recommendations, including the recommendation of Petitioner's removal, in her ROI *which was against written USDA procedural* guidelines. Appendix E. The Respondent violated Petitioner's due process rights, deprived him of Equal Protection under the law, and caused substantial prejudice to his individual rights by affecting the agency's decisions.

Without explanation or reason, Petitioner has been subjected to an investigation spanning over 40

years including years before he was employed by the Federal Government. When asked why this was done, Lohfink, the deciding official said he did not know. This took place because the Agency Investigation Coordinator became upset with Petitioner for not signing a fraudulent Position Description, (A prohibited personnel practice and reprisal).

The Merit Systems Protection Board's (MSPB)position that the decision maker did not rely on the Report of Investigation (ROI) is in error, and an abuse of discretion. In the proposed removal dated March 28, 2006, John White, Deputy Director, states:

The Report of Investigation has now been received and I have reviewed its **findings** in detail. The report substantiates serious mismanagement, waste, abuse, and personal misconduct by you **requiring** removal.

In the removal letter dated September 14, 2006, the decision-maker states: After reviewing the proposal letter, the ROI....I have reached the following determinations on each charge.

The decision-maker goes on to state that:

The National Finance Center (NFC) issued a letter dated March 28, 2006, to remove you, Donald Lewis, from your Federal position based on the results of a report of investigation (ROI), Allegations of Misconduct and Mismanagement by Donald

Lewis...conducted by Kathryn T. Vengazo, Consultant for FPMI, Inc.

With the Proposing Official clearly stating that he reviewed the (ROI) **findings** in detail and the **report required the Petitioner's removal** and the decision-maker stating in the decision that he reviewed the proposal letter and the ROI in making his decision, it defies any sense of logic and fairness to say the ROI was not considered in making the decision to remove the Petitioner. The Appeal Court states, "The deciding official did not testify that he did not rely on the report. He merely stated that he did not rely on the investigator's recommendation as to penalty. We therefore find that the Board did not err in rejecting Mr. Lewis' affirmative defense." Appendix A. This defies all principles of credibility, logic, and sound human and legal reasoning. When the deciding
official wrongfully considered the Investigator's findings, personal opinions, conclusions, and other recommendations regarding Petitioner, he considered ingredients that go into the making of penalty determination. The procedural guidelines recognized the harm that would be caused to a person when the procedure guidelines are not followed:

Investigators should refrain from drawing conclusions on the merits of the allegations. Investigators are exposed to information during the investigation which may not be incorporated in the investigation file, but nevertheless **could bias the**

investigator relative to any analysis of the allegations and could improperly influence the decision-maker.

The procedural guidelines cannot "ensure Department wide standard of quality and consistency" if they do not apply to all employees, all Investigators, and carry the force of law. The Respondent ordered the investigation with findings, conclusions, opinions, recommendations, including recommendations on penalty. When some one custom order and pay for a product they fully intend to use what is ordered. The Respondent's procedural guidelines should be analyzed under the standards of a contract. A contract must be construed in accordance with the terms and language used in the agreement. If the terms of the agreement are free of ambiguity and does not conflict with the policy of the law, the contract will be deemed to establish the rights of the parties. Contracts are to be read and understood according to the natural and obvious import of the language used therein. The USDA procedural guidelines does not distinguish between employee investigators and contract investigators. It is for the protection of all employees. To say that the USDA procedural guidelines do not have any legal weight is unconscionable. The document is replete with words such as **shall** and **should** which are defined in the dictionary when used in laws, directives, etc, as an obligation or must. Appendix E.

The Investigator's failure to follow the procedural guidelines permitted the investigator's biases to taint the entire investigation and subsequent report thereby denying the petitioner with a fair and impartial investigation. The agency failed to present Bachemin and Lorri Clark, employees among the group who led the action against Petitioner, for the hearing. Further, the Board and Appeal court failed and refused to consider the prohibited personnel practice of seeking to force Petitioner to sign a fraudulent position description for Bachemin. The Appeal Court states on page 4 of its March 7, 2008, decision that: See Appendix A.

From the finding, the Board concluded that he knew or should have known that he received the overtime payments in violation of the agency procedure. That conclusion, however, does not necessarily follow. Mr. Lewis may have been aware of the proper procedures, yet he may not have known that his timekeeper had not obtained supervisory approval. In any event, the Board found that the agency's charge against him did not require a finding of intent, and it was undisputed that the proper procedure was not followed. We agree with the Board that the charge does not specify an element of intent, and we therefore affirm the Board's determination with respect to that charge.

All of the compensatory time earned was recorded on Petitioner's time and attendance

reports that were reviewed and approved by each of his supervisors from 1994 thru 2005, over 10 years. A review of his T&A's would reveal Petitioner's supervisors should have never expected him to use the compensatory time earned because he was always in a "use or lose" annual leave status. Appendix F. Only after Respondent became upset with petitioner over not signing the fraudulent position description did this become a factor and to be part of the 40 years plus investigation. Petitioner never saw the forms completed for payment of compensatory time by Gaydos, Barnes, and M. Nguyen, timekeepers, and they did not require his approval. Petitioner was not negligent under any described standard of care. He was not aware of who authorized or approved the unused compensatory time each year for payments. All he knew was that he worked the extra hours and earned compensatory time recorded, his T&A's for the years 1994 thru 2005 had been reviewed and approved by his supervisors, and he was paid for compensatory time that was not used within the specified time frame because of his inability to take time off. It is the certifying officer's responsibility to verify that the forms are signed by authorized officials prior to payment. From 1994 thru 2005, over 10 years, his supervisors were aware that he was being paid for the unused time at the end of every year by their review of his T&A's and their budget reports Appendix F. John Ortego, NFC's Director from August 1997 to January 31, 2003, and Petitioner's first-level or second-level

supervisor during this time period, stated that he expected the Petitioner to be paid for the compensatory time earned. Appendix F.

In his response to the proposal notice and during his deposition, Petitioner offered to reimburse the agency for any compensatory payments received by him that they were contending proper management approval had not been obtained by the timekeepers and he did so. During Petitioner's oral response to the charges on April 26, 2006, where in a court reporter made a transcript, the deciding official, speaking of the compensatory time, stated, "No, and look, I know every hour that was on these things was approved by whoever your supervisor was at the time." "Page 134 of the oral response transcript. On page 135 of the transcript, he stated, "Well, I'm not sure it's illegal. It just didn't follow a process or whatever we have."

Notwithstanding the sustaining of the charge as unintentional/negligence, the Appeal Court and MSPB abused their discretion and approved the agency's removal of Petitioner based on the element of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985), Appendix J, wherein the agency charged the Appellant with negligence but **improperly** removed him based on the element of intent. In the instant case, the Respondent clearly charged petitioner with unintentionally /negligence but clearly used intent in it's penalty.
In regards to the charge of making false

statements during an official investigation, the Appeal Court states on pages 12-13 of the decision that "The Board sustained that charge after finding that Mr. Lewis falsely stated in an affidavit that he never made derogatory remarks about his employees' weight." Appendix A. The Appeal Court, MSPB, and Respondent violated Petitioner's due process rights, Fifth Amendment of the U.S. Constitution, and Equal Protection Under The Law in regards to the finding on this charge. Further, the AJ, Board, and Appeal Court improperly shifted to Petitioner the burden of proving that he did not make false statements during an official investigation. Additionally, the Respondent violated its own procedural guidelines for misconduct investigation which states that "the report should tell a story of what happened, who was involved, when and where it happened and why it happened." Petitioner made a timely request during discovery for detail descriptive specifics, including dates, times, and places of alleged incidents but the Agency said they did not have any. At the hearing the Deciding Official stated that he did not know when the alleged acts occurred; that they could have occurred any time with in the last 5 years or more. Yet he was willing to take away Petitioner's employment after over 36 years without a disciplinary record and near perfect performance history. Without the requested specifics, Petitioner cannot determine if he was at work or present at the place of the alleged incidents or that any such incident in fact occurred. See Mason v. Department of Navy, 70

MSPR 584, 586-89 (1996) Appendix I. The Respondent has not met its burden of a specific incident or pattern of conduct over time and of a preponderance of evidence that Petitioner falsely stated in an affidavit that he never made derogatory remarks about employees weight. Ortego, the former Director from August 1997 to January 2003, stated that Petitioner did not engage in such conduct and that he never received reports of such on Petitioner. Appendix F. Shirley LeBlanc, the agency's star witness stated in her affidavit that Petitioner made reference to "big people." No specifics were provided. Appendix G. Also, LeBlanc stated that she was upset with Petitioner because he had never rated her as Outstanding and because he, as her supervisor, would not get involved in her application for a position in another organization over which Petitioner had no control. Appendix G. Jo Ann Thomas, the employee referenced by Respondent, never stated in any manner that Petitioner ever referred to her as fat ass. Petitioner deserves fair treatment under the laws of the United States as would any citizen. The Board has held that to establish a charge of falsification, the agency must prove, by preponderant evidence, that the appellant: (1) supplied wrong information, (2) knowingly did so with the intention of defrauding, deceiving, or misleading the agency. Heebe v. Department of Justice, 288 F. 3d 1288, 1305 (2002), citing Naekel v. Department of Transportation, 782 F.2d 975, 977-78 (1986). Falsification and fraud cases often turn on proof of the element of intent.

However, a finding that an appellant has provided incorrect information cannot control the question of intent for purposes of adjudicating a falsification charge. Mendez v. Department of Treasury, 88 MSPR 596 (2001). Whether intent has been proven must be resolved by the totality of the circumstances. Blake v. Department of Justice, 81 MSPR 394 (1999). The Board must consider the appellant's plausible explanation as an element of the totality of the circumstances. Nelson v. U.S. Postal Service, 79 MSPR 314 (1998). Failure to provide Petitioner with specifics in which to prepare a response, including to determine whether he was at work and at the location of the alleged incident are part of the plausible explanation. Only the charges and specifications set out in the agency's proposal notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply. La Chance v. Merit Systems Protection Board, 147 F.3d 1367, 1371 (1998); McIntire v. Federal Emergency Management Agency, 55 MSPR 578, 583 n.4 (1992). Nor may the Board substitute what it considers to be a better basis for removal than what was identified by the agency. Shaw v. Department of the Air Force, 80 MSPR 98, 106-07 (1998). Rather, the Board is required to adjudicate an appeal solely on the grounds invoked by the agency and may not substitute what it considers to be a more appropriate charge. Riley v. Department of the Army, 53 MSPR 683, 688 (1992). Appendix M. See

also Gottlieb v. Veterans Administration, 39 MSPR 606, 609 (1989). The Appeal Court overlooked that the failure of the Agency to give the Petitioner adequately detailed notice prior to the hearing of the alleged misconduct prejudices his ability to mount a meaningful defense, denies him due process and violates Respondents own procedural guidelines. The Board and the Appeal Court acknowledges that the Agency could not provide Petitioner with needed specifics such as dates, places, and times. Speaking of the charges that included the specification of derogatory comments on employees' weight, the Appeal Court states:

It was inherent in the nature of the charges in those specifications, however, that great specificity was not possible. Three of the four specifications alleged a pattern of conduct overtime, rather than a particular incident. And the individual instances of inappropriate conduct such as angry remarks, insulting words, were not the types to which witnesses would ordinarily be expected to recall the precise date and surrounding circumstances. See Appendix A. The angry remarks and insulting words were I infact made by Clark. J. Nguyen, and Bachemin. See Appendix K.

Petitioner disagrees that a pattern exists. For a pattern to exist, some specific incidents on specific dates and times would be needed to support such a finding. Teamsters v. United States, 431 U.S. 324

(1977). The agency, as the charging party, bear the burden of showing, by a preponderance of the evidence, that a pattern is the Petitioner's regular and standard operating procedures. Teamsters v. United States, 431 U.S. 324 (1997); EEOC v. Ford Motor Co., 645 F.2d 183 (1981); Presseisen v. Swarthmore College, 442 F. Supp. 593 (1977). A time frame must be provided. The Petitioner cannot knowingly supply wrong information with the intent of deceiving without specifics of dates and times of the alleged incidents. If a pattern existed then that is more reason why specifics should be available to be provided to Petitioner. He did not make false statements during an official investigation.

The allegation of a pattern of conduct over time (charge) was not provided to Petitioner until the March 7, 2008, decision of the Appeal Court. Therefore, required notice was not provided. Without the requested specifics such as dates, times, places, of incidents, Petitioner cannot determine whether he was at work or present at the place of the alleged incidents. The law requires that he be provided sufficient specifics to provide a meaningful opportunity to be heard and to exercise his due process rights. See Barresi v. U.S. Postal Service, 65 MSPR 656 (1994), Goldberg v. Kelly, 397 U.S. 254, 267, 268 (1970), Ragolla v. U.S. Postal Service 983 F.2d 1086 (1992), and Mason v. Department of Navy, supra. Appendix I. The allegation of a "pattern" cannot be used to deny an individual of his due process rights. Petitioner

was not provided the number of alleged unlawful acts, the alleged time period over which the alleged acts occurred, requirements of a pattern. Indeed the deciding official stated that he did not know when the alleged acts occurred; that they could have occurred any time with in the last five years of more. Ortego, the former Director (from August 1997 to January 2003) stated that Petitioner did not engage in such conduct and he never received reports of such on Petitioner. Appendix F. In Jacques E. Lamour and Scott Roseberg v. Department of Justice, 2007 MSPR 185, 2007, the Board pointed out that an adverse action proposal letter needs to be sufficiently detailed to provide an employee proper notice to the charges against him. If an agency fails to do this, it denies the employee a meaningful opportunity to be heard. In that case, the Agency charged the Appellants with assault against an inmate but offered no other details such as when or where it allegedly occurred. In addition to the statutory requirements set out in subchapter 11 of chapter 75, sufficient notice of the basis for an agency's proposed action against a tenured employee also implicates due process requirements guaranteed by the 5th Amendment to the U.S. Constitution. ("No person shall be deprived of life, liberty, or property, without due process of law.") See La Chance v. Erickson, 522 U.S. 262, 266 (1998) See also Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970). In Cheney v. Department of Justice, 479 F.3d 1343, 1353 (2007), the court found that the agency's notice to Cheney that he had "inappropriately queried or

caused to be queried Law Enforcement Databases" was akin to informing Mr. Cheney that his security clearance had been suspended because he had robbed a bank, with out telling him where the bank was and when he had robbed it. It is appropriate to distinguish between a proposal to terminate employment permanently, in which case the requirements of due process may be more comprehensive, and a proposal to suspend an employee temporarily, in which case the requirements of due process are generally less demanding. Gilbert v. Homar, 520 U.S. 924, 930 (1997). Petitioner should be accorded the more comprehensive requirements of due process considering that he was an employee with over 36 years of Federal Service, a draftee of the U.S. Army for Vietnam Wartime service, an unblemished record, with his performance at the highest rating level and that he was facing permanent removal. When the Appeal Court states, "alleged a pattern of conduct over time," for the first time, the questions that the law indicates Petitioner need answers for to prepare a proper defense is what conduct over what period of time with some **specific incidents** on specific dates and times. Teamsters v. United States, 431 U.S. 324 (1997), Hazelwood School District v. United States 433 U.S. 299 (1977). The Agency, as the charging party, bears the burden of showing, by a preponderance of the evidence, that a pattern is the Petitioner's regular and standard operating procedure. Teamsters v. United States, 431 U.S. 324 (1977); EEOC v. Ford Motor Co., 645 F.2d 183 (1981);

Presseinsen v. Swarthmore College, 442 F. Supp. 593 (1977). The burden of a pattern has not been met. The Appeal Court overlooked the fact that Petitioner provided evidence that the burden was not met. Ortego, the Director of the Agency and Petitioner's Supervisor or Manager from October 1997 to January 2003, stated that Petitioner always conducted himself in a professional manner and treated him and others with dignity and respect. He stated that Petitioner did not use vulgar language or tell inappropriate jokes in his presence and never did anyone attribute such behavior to Petitioner. Appendix F. Patricia Duvernay who worked with and for Petitioner since 1989, and whose office was located next to Petitioner, stated, "Petitioner carried himself in a professional manner and did not tell inappropriate jokes about religion or people's weight." Appendix K. Diane Barnes, a retired employee who had worked for Petitioner since about 1991, and whose office was next to Petitioner, stated that she had never heard him use vulgar language or speak inappropriate comments or jokes and that she never heard him call anyone fat ass, bastard, or mother fucker. Hanh Nguyen an employee who worked in a cubicle about 10 feet in front of Petitioner's office, never heard Petitioner use vulgar or profane language, and never heard him use the terms bastard or mother fucker. These overlooked facts supports the finding that a preponderance of evidence does not exist to support a pattern. The Agency did not contest the veracity of their statements. The Appeal Court overlooked facts

and law in regards to the allegation on whether Petitioner's catching J. Nguyen's arm was inappropriate conduct. J. Nguyen stated that Clark, LeBlanc, and Thomas witnessed the incident of Petitioner catching her arm. LeBlanc and Thomas testified that they did not witness the occurrence. The Appeal Court overlooked the fact that Petitioner was passing the area of Kushindana's office door where Kushindana and J. Nguyen were standing. He was on his way to the men's room. J. Nguyen, acting in a playful manner, swung at Petitioner and he caught her arm. He did not squeeze her arm but held it so that she could not swing at him again. J. Nguyen did kick Petitioner with her foot. These all took place in one continuous motion and transaction. Petitioner continued on his path to the men's room. Petitioner did not perceive J. Nguyen's actions to be in anger but rather a playful act. J. Nguyen has motioned at Petitioner with her fist many times, but none that he perceived in anger. The Appeal Court overlooked the fact that J. Nguyen did not report this until many months had passed and she learned of the impact by the RIF. Petitioner should not be removed for a playful, "petty" act initiated by J. Nguyen. J. Nguyen clearly testified that the act was "Petty." The Appeal Court states on page 9 of its decision that (Appendix A):

"We find, however, that it was reasonable for the Board to infer that when Mr. Lewis asked his subordinate employees to perform personal work for him, the request was equivalent to an order

based on the relationship between Mr. Lewis and the employees."

This finding cannot be reasonable when it is untrue. The Court of Appeals and the MSPB abused their discretion, violated Petitioner's due process rights, and deprived him of Equal Protection of the Law by substituting new charges for Respondent after the hearing. The Appeal and Board is required to adjudicate an appeal solely on the grounds invoked by the agency and may not substitute what it considers to be a more appropriate charge. Riley v. Department of the Army, 53 MSPR 683, 688 (1992); Gottlieb v. Veterans Administration, 39 MSPR 606, 609 (1989). Appendix M. Petitioner was specifically charged with "directing" subordinate employees to perform personal work. Not one employee testified or provided a statement that the employee was directed by Petitioner to perform work. The relationship of Petitioner with the employees is set forth in their statements as follows:

Hanh Nguyen (July 11, 2006 Affidavit)

"Donald R. Lewis, Chief of EEOWSS, was my supervisor during my employment in EEOWSS. My workstation was located in a cubicle about ten feet from the door of Mr. Lewis' office. Mr. Lewis was very supportive of me and the other students in EEOWSS in our efforts to work and go to college. He always worked with me in arranging my work schedule and class exam schedule so that I could

accomplish both objectives. I enjoyed working for Mr. Lewis and found him to have a sense of humor that made the work environment a comfortable place to work. Mr. Lewis has never directed or forced me to perform personal work for him. I have never felt intimidated by Mr. Lewis. Anything that I did for Mr. Lewis was done during my break time.

Thanh-Thuy Nguyen (Affidavit July 5, 2006) "Donald R. Lewis, Chief, Equal Employment Opportunity and Workforce Services Staff, has never directed or forced me to type or perform personal work for him." I never performed any typing for Mr. Lewis against my will. On some occasions, I actually asked Mr. Lewis if he had any typing that I could perform for him. I never felt that I had to type anything for Mr. Lewis. Some of the typing was done on what could be considered my break time. Almost all of the typing was short in length. Further, it was not frequent that I typed something personal for Mr. Lewis. As stated in my affidavit on December 24, 2005, Mr. Lewis was an enjoyable manager to work with. I have been asked if I have looked anyone in the eye and said that I hate Mr. Lewis. I do not hate Mr. Lewis and I have never told anyone that I hate Mr. Lewis. Mr. Lewis was very supportive of me as a student so why could I hate him?

Thuy Thu Nguyen testified during the hearing (December 12, 2006) that she gave appellant a card in which she wrote, "Mr. Lewis, it was nice of you! I hate to admit this, but you have been so

nice and kind in mentoring me throughout the time in reaching my professional goals." She testified that Petitioner asked her to type something for him.

The law clearly provides that it is the specific charge that is controlling. The Respondent specifically charged Petitioner with "directing." The charge should be decided based on the specific charge and the preponderance of the evidence. See: Nazelrod v. Department of Justice, 54 MSRP 461 (1992); King v. Nazelrod, 43 F.3d 663 (1994); Nor may the tribunal substitute what it considers to be a better basis for removal than what was identified by the agency. Shaw v. Department of Air Force, 80 MSPR 98, 106-07 (1998); Riley, supra; Gottlieb supra.

In regards to credibility, the Appeal Court should not uphold the MSPB if there is a lack of sufficient or appropriate findings to sustain the result reached by the Board. In Goldstein v. Department of Treasury, 51 F.3d 1570, 1576 (1995) the court stated:

> Per its own precedent in Hillen v. Department of Army, 35 MSPR 453 (1987), the Board must ensure that the AJ has made appropriate credibility judgments detailing where and why she credited certain testimony over other testimony and resolving or reconciling all material conflicts in the record. Where the AJ has not, the Board must fill in the gaps, remanding for further evidentiary hearing, if

necessary. Although we review credibility and other factual determinations under an extremely deferential standard, where, as here, the Board and/or the AJ have failed to make necessary findings, we will not "rubber stamp" the decision because of a deferential standard of review.

The Petitioner asserts that the Board's credibility determinations were abbreviated, based on improper considerations, unsupported by the record, and failed to meet the requirements in Hillen v. Department of Army, 35 MSPR 453 (1987), Garza v. Department of Army, 57 MSPR 214 (1993). The Appeal Court does not owe deference to the Board's AJ's credibility determination where the findings are incomplete, inconsistent with the weight of evidence, and do not reflect the record as a whole. The Board's AJ makes the conclusory credibility finding on page 10 of the Board's decision stating, "Furthermore, I found the appellant's general demeanor while testifying, i.e., his carriage, behavior, manner, and appearance demonstrated a lack of candor." The AJ did not describe Petitioner's carriage behavior, manner, and appearance. See Appendix C. The AJ did not describe Petitioner's carriage, behavior, manner, and appearance. The Board's AJ also states that the Petitioner's behavior reflects a significant lack of honesty and integrity because he intended to submit a research paper that the Petitioner conceded was written by one of his students for his son's admission to a Ph.D. program. The AJ's finding

is arbitrary, capricious, abuse of discretion, and not supported by substantial evidence. Petitioner testified that the student wrote some of the paper that he wrote some of the paper. Petitioner told the truth. In Special Counsel v. Eubanks, 76 MSPR 405, 416 (1997), the Board stated that it is error for a fact finder to rely on a witness's demeanor to find that her testimony is untrue without explaining anything about her manner and appearance that warranted that conclusion. Petitioner's carriage, behavior, manner, and appearance should have been described. The AJ, Board, and Appeal Court went on to use the erroneous general credibility finding to make other credibility findings against Petitioner and to sustain each charge. Further, it should be noted that the AJ's description for Petitioner's demeanor comes directly out of Peter Broida's "A Guide to Merit Systems Protection Board Law and Practice" page 865, which states, "Demeanor constitutes the carriage, behavior, manner, and appearance of a witness during testimony." The elements are the same and in the same order. The Board should not provide deference generally reserved for a judge's credibility finding if those findings suffer from paucity of explanation. See Garza v. Department of Army, 57 MSPR 214 (1993).

The Appeal Court overlooked the law and facts on the impact of the conduct of those who acted in bad faith and with malice and engaged in collusion among themselves and with the Investigator to harm and destroy Petitioner. The

Appeal Court stated on page 3 of it's decision that it would address these issues under Seavello v. Department of Navy, 4 MSPB 239, 241(1980) but it did not. Bachemin spoke with the Investigator and the other employees acting with malice and in collusion against Petitioner. Appendix N. The Investigator went on to make findings, conclusions, opinions, and recommendations against Petitioner, including the recommendation of his removal. The fabrications by Bachemin against Petitioner because her promotion position description was in issue and her influencing others against Petitioner was not cured by the AJ stating that the Board was not using her statement. The vine had already been poisoned. The Misconduct Investigator Coordinator, became upset with Petitioner when he would not sign the fraudulent position description for Bachemin. She ordered the investigation of Petitioner for a period of over 40 years, a time period exceeding his Federal employment, and with requirements of personal opinions, conclusions, and recommendations, including the recommendation of Petitioner's removal, all violations of the Agency's procedural guidelines. Appendix E. A prohibited personnel practice was committed against petitioner. Kushindana threatened to cause problems for Petitioner if J. Nguyen was impacted by the RIF rather than M. Nguyen and on August 3, 2005, threatened to run Petitioner off since it did not appear he was going to leave. Appendix H. The Board and Appeal Court overlooked the law in Seavello v. Department of Navy, supra, wherein

charges based upon conduct that occurred two years prior were brought to the agency's attention in an untimely fashion by an employee who knew of the conduct all along but choose to alert the agency to it for personal reasons. The charges were dismissed because there were serious issues of credibility and because the Board found the case against the appellant "irrevocably tainted by personal animus." Appendix A and C. The Board and Appeal Court ignored the Psychological Stress Evaluator (Voice Lie Detector) tests of Petitioner taken on April 8 and 13, 2006, without explanation or reason, that included the threats made to harm him. Appendix H. When the Board and Appeal Court ignored this evidence of Petitioner, they harmed him, including the denial of his right to fully present his position and abridged his rights under the U.S. Constitution. It denied Petitioner Equal Protection under the law and the U.S. Constitution. Petitioner pointed out to the Agency, AJ, Board, and Appeal Court that the Agency knew that Kushindana was not being honest when she said Petitioner had spoken to her when he was upset about not getting a promotion to a GS-15 that he applied for but was not selected by the Agency and she asked him if he had thoughts about retiring. This never took place; he **never** applied for a GS-15 at the Agency to be upset about not being selected. The agency did not have any records they could produce on Petitioner applying for a GS-15. It is inherently improbable that a person would be expressing disappointment over not being selected for a GS-15 at an organization

when he never applied for a GS-15 there. In an effort to harm Petitioner, Kushindana went on to testify that only Petitioner knew about her conducting private business on Government time and equipment. Kushindana alleged that Petitioner would not take appropriate management action against a contract employee on allegation of sexual harassment. However, when Petitioner reassigned a counseling case after Kushindana belatedly told him about comments made to her by Gary Dukes, she filed a complaint against Petitioner. Again, as to Kashindana performing personal work, it is inherently improbable Petitioner knew because he worked in a differen suite o office from Kashindana.

The Appeal Court is in error on the law and facts on the charge of failure to take appropriate management action. On page 6 of the decision, the Appeal Court found (Appendix A):

> Ms. Byrne's affidavit stated that she learned of the contract employee's conduct from another employee who Ms. Nguyen and Ms. Kushindana had complained. Based on Ms. Byrne's affidavit, we find that the Board's conclusion that Mr. Lewis knew of the contract employee's conduct before February 17 to be supported by substantial evidence. We therefore affirm the Board's holding with respect to the second charge.

Byrne's affidavit was provided to the Appeal Court

by Respondent, pages 142-143 of their Appendix. A careful reading of Byrne's affidavit will support a finding that the findings are not supported by facts. She has never stated that "another employee" told her of Kushindana or that Kushindana communicated any allegation of sexual harassment to her. Petitioner's communication with Byrne on the morning of February 17, 2005, that included reporting J. Nguyen's and Kushindana's position on the contract employee rather than just Nguyen's is the
only evidence of Kushindan's position being conveyed to Byrne. See also Appendix K. The Appeal Court stated something as fact that is not in the record. Petitioner asked the Appeal Court to review Byrne's affidavit in the face of the factual error but they did not. Prior to February 17, 2005, Petitioner had asked Nguyen if there were any issues with the contract employee and she told him no. Nguyen come to Petitioner once and asked Petitioner why he did not get his haircut like the contract employee. At that time Petitioner did not know the identity of the contract employee. There was no issue of sexual harassment with the contract employee presented to Petitioner until the morning of September 17, 2005. When Byrne called on February 17, 2005, she clearly stated that she was returning Petitioner's call on Nguyen, Kushindana, and the contract employee. See Appendix K.

The employment history of the employee and the Investigator's conduct should be considered in an

analysis of the penalty in this case. The Agency Misconduct Investigator Coordinator, ordered an investigation of Petitioner for a period of over 40 years without boundaries as to issues and USDA procedural violations. Given the investigators conduct, including that of telling Petitioner upon the opening of his interview that he should be gone, and the gross procedural violations it is Petitioner's position that the investigator was hired to build a case for his removal. She was upset with Petitioner for not signing a fraudulent position description for Bachemin, a prohibited personnel practice. Bachemin, along with other employees who were upset with Petitioner over J. Nguyen being impacted by the RIF rather than M. Nguyen, orchestrated and encouraged the employees against Petitioner. Cook ordered the investigation in total violation of the procedures set forth in the USDA procedure guidelines for misconduct investigations, with the procedure guidelines stating that failure to follow them could improperly influence the decision-maker. Appendix E. Petitioner, at the time of the investigation, had over 36 years of Federal service with an unblemished disciplinary record, a near perfect performance history record at the highest level with his last rating being at the highest level, and having served 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable Discharge and Letter of Appreciation from General William Westmoreland for his war time service. He won national awards for himself and the Agency. No other EEO Manager carried the office and

programs to the level of achievement of Petitioner. See Appendix F. No individual or tribunal has set forth any analysis of their rational on finding Petitioner not fit for employment after over 36 years of basically perfect employment record as to performance and conduct. When it became clear to Petitioner that Respondent and the particular group of employees were determine to destroy him, Petitioner sought and received favorable consideration for employment by 2 other Federal agencies. One agency offered Petitioner a position and he accepted. However, one day after the agency contacted Respondent, the offer was withdrawn. When the other agency contacted Respondent for a reference on Petitioner, the agency stopped their process of consideration. Respondent's desire to prevent Petitioner from going on else where with his life and to hold him within their grip so that they could not just remove him but rather destroy him has to be considered when considering the reasonableness of the penalty and motive. Respondent has never set forth any position on why they harmed Petitioner in his efforts to leave and go on with his life. When the deciding official was asked why Petitioner was investigated for over 40 years he answered that he did not know.

Upon the Investigator, initial contact with Petitioner, she told him that, "you ought to be out of here," and that he should be retired before having his position on any issue. Petitioner's rating was at the Outstanding level, the highest rating possible. The

Investigator presented her (ROI) preliminary findings to the deciding official on January 3, 2006. She did not have Petitioner's affidavit until after January 19, 2006.

In reviewing the penalty determination, the Appeal Court overlooked points of law and facts. In doing so, the Appeal Court, MSPB, and Respondent violated Petitioner's Rights of Equal Protection Under the Law, Due Process Rights, and Fifth Amendment of the U.S. Constitution by taking away his protected property interest in his employment by the Respondent charging him with unintentional/negligence and the MSPB and Appeal Court sustaining the Respondent's findings on the same basis and Respondent removing Petitioner by applying the element of intent for the same charges and the Appeal Court and MSPB abusing their discretion by sustaining the Penalty of removal by Respondent on the basis of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985), (Appendix J) wherein the Agency charged the Appellant with negligence but **improperly removed** him based on the element of intent. The Board and Appeal Court acknowledge that Respondent never charged or proved the element of intent against Petitioner yet they approved his removal on that basis.

An employee with no prior disciplinary record, good prior performance and job dedication possesses good potential for rehabilitation. Petitioner presented these and more. His

performance was almost always at the highest level and his dedication to the job is supported by the many awards won for the Agency, over 25 personal awards, the developing of the office to the highest level of achievement ever, and over 36 years of Federal Service with no disciplinary record. See Appendix F. Petitioner's personal development was gained against the odds. He was restricted by state action to attending a condemned school. He never had a text book that had not expired until he graduated from high school and made personal purchases. All of his education was gained while working.

The Board and the Appeal Court have refused to address the issue of prohibited personnel practice of Petitioner refusal to sign the fraudulent position description on Bachemin. Kushindana threatened Petitioner including to run him off. See Appendix H. Bachemin went to the deciding official and sought a promotion and Petitioner's removal. She got both. Petitioner was administered 2 psychological stress evaluator (voice lie detector) tests that included the threats with the result being that he was being truthful. Appendix H. The AJ, Board, and Appeal Court ignored the test results and never addressed them. When the Appeal Court ignored the tests results it harmed Petitioner, including the denial of his rights to fully present his position and abridged his rights under the U.S. Constitution. The deciding official relied upon information in charges that he stated he did not know when the alleged misconduct suppose to have occurred, that it

could have occurred five years ago or more. Respondent violated its own procedural guidelines on investigations which states that "the report should tell a story of what happened, who was involved, when and where it happened and why it happened." Yet he was willing to take away everything that Petitioner had worked for as to employment. The Board and appeal Court did not properly review the agency's penalty selection to assure that the Agency conscientiously and properly considered the relevant factors in choosing the penalty and striking a reasonable and responsible balance within tolerable limits of reasonableness. See also the table of penalties in Appendix L. For arbitrary, invidious, and capricious reasons the Appeal Court engaged in judicial misconduct that was wrong and harmed Petitioner as a citizen seeking a just and fair review of the issues in his case. The Appeal Court wrongfully considered Petitioner's eligibility for retirement. Due to word limitation, Petitioner respectfully request that the Supreme Court read Appendix O for more information on this judicial misconduct issue. Petitioner never received a response or answer.

Conclusion

This petition for a writ of certiorari should be granted. The Appeal Court and Board have decided important questions of federal law in away that conflicts with relevant decisions of this Court and failed to consider important questions of federal law such as prohibited personal practices

and reprisal for failure to engage in such. The Appeal Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, to include that of judicial misconduct and the consideration of Petitioners eligibility for retirement in reaching its decision when such was not in issue.

Respectfully Submitted,

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Pro Se
Date: 7/25/08